Supreme Court, U.S.
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No. 10-574

In The

Supreme Court of the United States

ROBERT BARNWELL, as surviving spouse and personal representative of Tammy Barnwell, and as Administrator for the Estate of Tammy Barnwell,

Petitioner,

v.

DOUGLAS COUNTY, GEORGIA, DOUGLAS COUNTY SHERIFF PHIL MILLER, in both his official and individual capacity, and CHRISTOPHER BLACK, in both his official and individual capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff who has suffered a constitutional injury due to the deliberate indifference of a local government, under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), must show, as a prerequisite to local government liability, that an individual employee of the local government is personally liable for the injury alleged.

LIST OF PARTIES

The Petitioner herein, and Plaintiff in the proceedings below, was Robert Barnwell, as surviving spouse and personal representative of Tammy Barnwell, and as Administrator of the Estate of Tammy Barnwell. The Respondents herein and Defendants below were Douglas County, Georgia, Douglas County Sheriff Phil Miller, both in his individual capacity and in his official capacity as Sheriff of Douglas County, and Christopher Black, both in his individual capacity and his official capacity as a deputy of the Douglas County Sheriff's Department.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	2
Argument	4
CLAIMS UNDER *MONELL* FOR INJURIES ARISING FROM A LOCAL GOVERNMENT'S DELIBERATE INDIFFERENCE TO DANGERS POSED BY ITS OFFICERS TO THE RIGHTS OF THE PUBLIC DO NOT, AS A MATTER OF LAW, REQUIRE PROOF THAT AN INDIVIDUAL OFFICIAL COMMITTED CONDUCT THAT, STANDING ALONE, WOULD RENDER THE INDIVIDUAL OFFICIAL PERSONALLY LIABLE	4
Conclusion	16

Appendix Table of Contents

Opinion of the United States Court of Appeals for the Eleventh Circuit	App. 1
Judgment of the United States Court of Appeals for the Eleventh Circuit	App. 6

TABLE OF CONTENTS – Continued

Page

Order of the United States District Court for the Northern District of Georgia ..... App. 8

Amended Complaint ..... App. 25

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985) 6, 8

Barrett v. Orange County Human Rights Commission, 194 F.3d 341 (2nd Cir. 1999) 8

City of Canton v. Harris, 489 U.S. 378 (1998) 5, 10, 13

Evans v. Avery, 100 F.2d 1033 (1st Cir. 1996) 9

Fagan v. City of Vineland, 22 F.3d 1283 (3rd Cir. 1994) 8, 13, 15

Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985) 5, 6, 8

Heller v. City of Los Angeles, 475 U.S. 796 (1986) ..... *passim*

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) ..... *passim*

Rooney v. Watson, 101 F.3d 1378 (11th Cir. 1996) 7, 9

S.P. v. City of Takoma Park, Md., 134 F.3d 260 (4th Cir. 1998) 9

Scott v. Clay County, Tenn., 205 F.3d 867 (6th Cir. 2000) 9

Speer v. City of Wynne, Arkansas, 276 F.3d 980 (8th Cir. 2002) 9, 10, 11

TABLE OF AUTHORITIES – Continued

Page

Thomas v. Cook County Sheriff's Department, 604 F.3d 293 (7th Cir. 2010) 8, 11, 12

Trigalet v. City of Tulsa, Oklahoma, 239 F.3d 1150 (10th Cir. 2001) 7, 9

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. XIV 1

RULES:

Supreme Court Rule 10(a) 1

STATUTES:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reproduced at App. 1. The opinion of the United States District Court for the Northern District of Georgia is reproduced at App. 8.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit rendered on July 30, 2010. (App. 1). The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1). *Certiorari* is sought to resolve a conflict among the Circuit Courts of Appeal, pursuant to Supreme Court Rule 10(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the due process clause of the Fourteenth Amendment to the United States Constitution, which provides, "No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This appeal also involves the Civil Rights Act of 1871, 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Petitioner originally filed this action in the Superior Court of Douglas County, Georgia, on November 24, 2008. The action was removed to the United States District Court for the Northern District of Georgia on December 23, 2008. The Amended Complaint was filed in the district court on January 27, 2009. (App. 25).

The Amended Complaint alleged that Douglas County and Douglas County Sheriff Phil Miller, acting in his official capacity (collectively referred to hereinafter as the "county defendants"), deprived Tammy Barnwell of her substantive due process right to life by exercising deliberate indifference toward a well-known pattern and practice of reckless driving among Douglas County sheriff's deputies. (App. 32-34, 38-39). The Amended Complaint alleged that this deliberate indifference was manifested in a complete absence of training or discipline in the area of driving safety, in spite of a documented history of widespread and unchecked reckless driving. (*Id.*). As a direct result of this deliberate indifference, former deputy sheriff Christopher Black ("Black"), while twisting around winding rural roads in the dark of night, at speeds approaching 90 miles per hour, without the use of emergency sirens or lights, and with no emergency

to respond to, smashed his police cruiser into Tammy's vehicle and killed her. (*Id.* 29-35).[1]

On August 21, 2009, the district court granted the Defendants' Motion for Judgment on the Pleadings. (App. 8). The district court found, first, that under Eleventh Circuit precedent, a police officer is not personally liable under § 1983 for the negligent or even grossly negligent operation of his motor vehicle and, therefore, Black was not individually liable. (App. 17-18). The district court then entered judgment on the pleadings for the county defendants finding that, under this Court's *per curiam* decision in *Heller v. City of Los Angeles*, 475 U.S. 796, 799 (1986), because Black was not personally liable, the county defendants could not be held liable as a matter of law. (App. 18-21). The district court characterized local government liability under *Monell* as "derivative" of the liability of an individual government official. (App. 19 n. 2).

The Court of Appeals affirmed the district court's order, concluding that, because Black was not individually liable under Eleventh Circuit precedent, the

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[1] To underscore the fact that the conduct tolerated by the county defendants in this case reached far beyond standard automobile negligence, it is worth noting that, subsequent to the district court's order granting the defendants' motion for judgment on the pleadings, Black was convicted of felony vehicular homicide for his behavior on the night of Tammy's death.

county defendants were "also entitled to judgment in their favor," as a matter of law. (App. 5).

ARGUMENT

CLAIMS UNDER *MONELL* FOR INJURIES ARISING FROM A LOCAL GOVERNMENT'S DELIBERATE INDIFFERENCE TO DANGERS POSED BY ITS OFFICERS TO THE RIGHTS OF THE PUBLIC DO NOT, AS A MATTER OF LAW, REQUIRE PROOF THAT AN INDIVIDUAL OFFICIAL COMMITTED CONDUCT THAT, STANDING ALONE, WOULD RENDER THE INDIVIDUAL OFFICIAL PERSONALLY LIABLE.

Following this Court's *per curiam* decision in *Heller*, a deep split has developed among the circuits regarding whether a legal prerequisite to local government liability under *Monell* is proof that an individual employee of the local government committed an act that, standing alone, would render him or her personally liable.

In *Monell*, this Court held that a municipality is a "person" for purposes of § 1983, which may be held liable where its policy or custom causes a constitutional injury. 436 U.S. at 690. The *Monell* court made explicit that a local government's liability under § 1983 is not derivative of the liability of its employees under a *respondeat superior* theory. *Id.* at 691. Rather, municipal liability under *Monell* arises "when

execution of a government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

In *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1998), this Court held that a municipality is liable under *Monell* where its failure to adequately train its employees in an area of known or obvious danger to the rights of the public proximately causes harm. Under *Harris*, a local government's liability for failing to train its employees arises "where the failure to train amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact." *Id.* at 388-89.

Prior to this Court's *per curiam* decision in *Heller*, decisions of the Tenth and Eleventh Circuits confirmed that a local government's liability under *Monell* derives not from an individual officer's wrongdoing, but from *institutional* failures that endanger the rights of citizens. In *Garcia v. Salt Lake County*, 768 F.2d 303, 305 (10th Cir. 1985), a jury determined that the county was liable for "gross deficiencies" in the staffing of its jail, which caused the plaintiff to be deprived of needed medical attention and to die while in custody. But the jury also found that the individual officers at the jail, who had been named as defendants, were not personally liable. *Id.* The County appealed, arguing that the verdict in favor of the individual officers, but against the county, was

inconsistent. The Tenth Circuit rejected that argument and affirmed the verdict, holding:

> *Monell* does not require that a jury find an individual defendant liable before it can find a local governmental body liable. The language of § 1983 "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Monell*, 436 U.S. at 692, 98 S.Ct. at 2036. Although the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights.

Id. at 310.

That same year, the Eleventh Circuit also held, in *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985), that "*Monell* . . . and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government."

The clarity in the law embodied by *Garcia* and *Anderson* turned to confusion and disagreement after this Court's 1986 *per curiam* decision in *Heller*.[2]

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[2] The *Heller* Court upheld the dismissal in response to the petition for writ of certiorari, without entertaining briefs on the merits or oral argument. *See* 475 U.S. at 800 (Marshall, Stevens, dissenting).

In *Heller*, the plaintiff brought claims under § 1983 against the City of Los Angeles, its police commission, and a city police officer. The plaintiff alleged that he was arrested without probable cause and that the officer used excessive force in making the arrest. The district court bifurcated the trial, and after the jury returned a verdict in favor of the officer, the district court dismissed the municipal defendants. The *Heller* majority affirmed, reasoning that the municipal defendants' alleged liability stemmed from their legal responsibility for the officer's individual conduct; therefore, a finding that the officer's conduct was not unconstitutional obviated any possibility that the municipal defendants were subject to liability. *See* 475 U.S. at 799 ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.").

Post-*Heller*, both the Tenth and Eleventh Circuits have published opinions inconsistent with their prior rulings, finding that individual liability is a prerequisite to local government liability under *Monell*. *See Trigalet v. City of Tulsa, Oklahoma*, 239 F.3d 1150, 1154 (10th Cir. 2001) (officer's high speed chase through eight stop signs in residential neighborhood in non-emergency situation, causing death of an innocent bystander, did not violate the Constitution; therefore city not liable for its failure to monitor and supervise pursuits, even if said failure caused plaintiff's death); *Rooney v. Watson*, 101 F.3d 1378, 1381

(11th Cir. 1996) (county not liable for its "custom or policy of allowing patrol vehicles to drive recklessly," which resulted in Plaintiff's injury, since reckless driving by an individual officer does not violation constitution). However, neither *Garcia* nor *Anderson* has been expressly overruled. *See Barrett v. Orange County Human Rights Commission*, 194 F.3d 341, 350 (2nd Cir. 1999) (post-*Heller*, citing *Garcia* and *Anderson* as persuasive authority).

Heller has not only created inter-circuit inconsistencies within the Tenth and Eleventh Circuits, it has also led to a major split among the circuits.

In the wake of *Heller*, the Second, Third, Seventh, and Eighth Circuits have adopted the view that *Heller* does not impose upon *Monell* an absolute requirement that the plaintiff prove liability on the part of an individual officer as a prerequisite to the local government's liability. *See Barrett*, 194 F.3d at 244 (consistent with *Heller*, "a municipality may be found liable under § 1983 even if no named individual defendants are found to be liable"); *Fagan v. City of Vineland*, 22 F.3d 1283, 1294 (3rd Cir. 1994) ("a municipality can be liable under section 1983 and the Fourteenth Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution."); *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293, 305 (7th Cir. 2010) (county may be liable even where individual employee is not, so long as such a finding would not create an inconsistent verdict);

Speer v. City of Wynne, Arkansas, 276 F.3d 980, 986 (8th Cir. 2002) (rejecting view that *Heller* establishes requirement that municipal employee be found liable as predicate to municipal liability; noting that "situations may arise where the combined actions of multiple officials or employees give rise to a constitutional violation, supporting municipal liability, but where no one individual's actions are sufficient to establish personal liability for the violation").

On the other side of the issue, the First, Fourth, Sixth, Tenth, and Eleventh Circuits have adopted a restrictive view, holding that *Heller* creates an absolute legal bar to municipal liability absent proof of an individual officer's liability. *See Evans v. Avery*, 100 F.2d 1033, 1039-40 (1st Cir. 1996) (interpreting *Heller* to mean that absent constitutional violation by officer, city cannot be held liable); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 272 (4th Cir. 1998) (even assuming training of officers was unconstitutional, city could not be held liable where no constitutional violation by officers had occurred); *Scott v. Clay County, Tenn.*, 205 F.3d 867, 879 (6th Cir. 2000), *cert. denied*, 531 U.S. 874, 121 S.Ct. 179 (2000) (holding that conclusion that no officer-defendant deprived plaintiff of any constitutional right a fortiorari defeats claim against county); *Trigalet*, *supra* (Tenth Circuit); *Rooney*, *supra* (Eleventh Circuit).

The restrictive view is inconsistent with *Monell*'s holding that local governments are "persons" that are liable under § 1983 when their policies or customs result in constitutional injuries. *Monell* made clear

that municipal liability under § 1983 is not derivative of an individual employee's liability, and does not sound in *respondeat superior*. *See* 436 U.S. at 691.

Moreover, neither *Monell* nor *Harris* imposes upon plaintiffs the absolute requirement to prove individual liability on the part of a government official in order to sustain municipal liability based on the government entity's unlawful policy or custom. Under *Monell*, the proper inquiry is whether the plaintiff's injury is caused by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. Similarly, under *Harris*, the proper inquiry in a failure to train case is whether the plaintiff's injury arises out of ***the local government's*** "deliberate indifference to the rights of persons with whom the [government's officers] come into contact." 489 U.S. at 388-89. Neither *Monell* nor *Harris* predicates local government liability upon a finding that an individual officer is also liable for the same constitutional injury.

The more flexible view permits courts to conduct the inquiries called for by *Monell* and *Harris* by analyzing each case on its facts. As noted by the Eighth Circuit in *Speer*, the ultimate question posed by *Monell* is whether the governmental policy or custom was the "moving force" behind the deprivation of the plaintiff's constitutional rights. 276 F.3d at 986. As the *Speer* court held, the effect of an individual's liability on the *Monell* inquiry "depends on

the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by the individual actors." *Id.*

The *Speer* Court correctly reconciled its decision with *Heller*: "a crucial factor underlying the Supreme Court's decision in *Heller* was that the theory of municipal liability asserted was entirely dependent on the county defendants' responsibility for the officer's alleged unconstitutional act." *Speer*, 276 F.3d at 986. Therefore, where the theory of liability asserted by the Plaintiff is not wholly contingent upon the individual's conduct, a finding in favor of the individual is not inconsistent with a verdict against the municipality.

The restrictive view prevents recovery by plaintiffs who have suffered the loss of their constitutional rights to life, liberty, or property, due to *systemic* failures by an institution, not solely attributable to the act of a single government official. For example, in the Seventh Circuit case of *Thomas*, the plaintiff died from pneumococcal meningitis while being held in pretrial detention at the Cook County jail, as a result of a "widespread policy of disregarding detainees' medical requests." 604 F.3d at 297-98. The evidence in that case showed that the widespread policy of neglect was not attributable to any individual officer; rather, it was the result of severe understaffing, which prevented officers from timely responding to medical requests. *See id.* at 298-301. The jury found the individual jailers not liable, but returned a

verdict against the county due to its systemic failures. *Id.* at 305. The Court of Appeals affirmed, rejecting the argument that the verdict was inconsistent with *Heller*. To wit: "The jury could have found that the [jail staff] were not *deliberately indifferent* to [the plaintiff's] medical needs, but simply could not respond adequately because of the well-documented breakdowns in the County's policies . . . " *Id.*

Here, Tammy Barnwell lost her life as a direct result of systemic and deliberate inaction by the policymakers of the Douglas County Sheriff's Department. As alleged in the Complaint, Black's reckless driving was part of a sustained and widespread culture and practice of reckless driving in non-emergency situations, which was permitted and even encouraged by the policymakers of the Douglas County Sheriff's Department. (App. 38). In the years prior to Tammy's death, the deputies' reckless driving had caused numerous previous accidents resulting in injury to residents and damage to property. (App. 32-34). Yet, the Sheriff's Department scheduled no driver safety training during that period of time. (*Id.*). Further evidence developed during the investigation of this matter revealed that a number of the Department's employees, as well as concerned citizens, had "blown the whistle" on widespread reckless driving; yet, nobody did anything to increase supervision or

initiate training of the officers.[3] Therefore, the events that gave rise to the arbitrary deprivation of Tammy's right to life fit the *Harris* court's description aptly: the Douglas County Sheriff's Department's failure to train and discipline its officers "amount[ed] to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388-89.

The Third Circuit addressed a nearly identical issue in *Fagan* and explicitly rejected the argument that a local government's liability for its officers' reckless driving necessarily hinges, as a matter of law, on an individual officer's liability. In that case, a group of officers conducted a high-speed chase that led to the death of a group of innocent motorists. The officers were found not to be liable; yet, the evidence supported a finding that the deaths were proximately caused by the city "not properly training and supervising police officers in the conduct of high-speed pursuits." *Id.* at 1289.

Fagan specifically held that the City could be found liable notwithstanding the officers' lack of liability. This decision represents the most thoughtful post-*Heller* analysis of the question presented in this petition. To wit:

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[3] The district court denied the parties any opportunity to conduct discovery in this matter; therefore, the factual record regarding the full scale of the failures of the county defendants was never developed.

> A finding of municipal liability does not depend [. . .] on the liability of any [. . .] officer. The fact that the officer's conduct may not meet the . . . standard does not negate the injury suffered by the plaintiff [. . .]. If it can be shown that the plaintiff suffered that injury [. . .] because the officer was following a [. . .] policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights. The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City. [. . .]
>
> If we conditioned municipal liability on an individual police officer's liability in every case, it might lead to illogical results. A municipality would escape liability whenever the conduct of the acting police officer did not meet the "shocks the conscience" standard, even though municipal policymakers, acting with deliberate indifference or even malice, implemented a policy which dictated his injury-causing actions. It is easy to imagine a situation where an improperly trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability because his conduct did not "shock the conscience." It does not follow, however, that the city should also escape

> liability. The city caused the officer to deprive the plaintiff of his liberty; the city therefore has violated the plaintiff's Fourteenth Amendment rights.

Id. at 1292.

In this case, neither the district court nor the Court of Appeals considered the merits of Plaintiffs' allegations that the county defendants maintained a policy and practice of deliberate indifference to a culture of reckless driving among its officers. Instead, both courts essentially ended their inquiry by deciding that Black's conduct, in isolation, did not violate the constitution. Both courts held that, as a matter of law, an absolute legal prerequisite to governmental liability under *Monell* was an underlying constitutional violation by an individual official. In so doing, both courts adopted a restrictive and inflexible view of *Monell* that does not comport with the reasoning of that decision.

Given the sharp split among the circuits regarding the requirement of individual liability as a prerequisite to local government liability under *Monell*, and the severe consequences to public safety and the rights of citizens in the circuits adhering to the restrictive view, *certiorari* review is warranted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of *certiorari* to the Eleventh Circuit U.S. Court of Appeals in this case and review of the decision of that court on the merits.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-14574

D. C. Docket No. 08-03877-CV-ODE-1

ROBERT BARNWELL,
As Surviving Spouse and
Personal Representative of
Tammy Barnwell, As Administrator
for the Estate of Tammy Barnwell,

Plaintiff-Appellant,

versus

DOUGLAS COUNTY,
DOUGLAS COUNTY BOARD
OF COMMISSIONERS,
SHERIFF PHIL MILLER,
Douglas County, in both his
official and individual capacity,
CHRISTOPHER BLACK,
in both his official and individual capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(July 30, 2010)

Before DUBINA, Chief Judge, PRYOR and MARTIN, Circuit Judges.

PER CURIAM:

Plaintiff Robert Barnwell, as the surviving spouse and personal representative of Tammy Barnwell, as well as in his capacity as administrator for the estate of Tammy Barnwell, appeals the district court's order staying discovery, granting partial judgment on the pleadings on Plaintiff's federal-law claims, and declining to exercise supplemental jurisdiction over the remaining state-law claims.

On the evening of November 14, 2007, on-duty Douglas County Deputy Sheriff Christopher Black was driving on a routine patrol in his county-owned patrol vehicle on a rural road in Douglas County, Georgia when he lost control of his vehicle, crossed the center line, and struck head-on an oncoming vehicle driven by Tammy Barnwell. Barnwell subsequently died from the injuries she sustained in this crash. It is undisputed that, at the time of the crash, Black was driving in excess of the speed limit – at times in excess of 88 miles per hour – and failed to activate his emergency lights or sirens. Black contends that, prior to the crash, he received a dispatch call informing officers of a vehicle fleeing the scene of a suspected armed robbery several miles from Black's location. Plaintiff alleges that it is "unlikely" that Black was responding to this call at the time of the accident because the robbery was miles from Black's location, outside of his assigned patrol area, other

officers were closer in proximity, Black failed to follow department policy and radio to dispatch his intent to respond to the robbery, and he failed to activate his emergency signals, as required by standard operating procedures for an officer responding to a dispatch.[1]

Plaintiff filed suit in the Superior Court of Douglas County, Georgia against Black, in his official and individual capacity, Douglas County, the Douglas County Board of Commissioners, and Douglas County Sheriff Phil Miller, in his official and individual capacity (hereinafter "Defendants").[2] The case was subsequently removed to the United States District Court for the Northern District of Georgia. In his amended complaint, Barnwell asserted state-law negligence and wrongful death claims, as well as federal § 1983 claims, against defendants Black, Miller and Douglas County. After the plaintiff voluntarily dismissed several of his original claims, the only remaining claims were state-law negligence claims against defendants Douglas County and Sheriff Miller, in his official capacity, and § 1983 claims against defendants Douglas County, Black,

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[1] Deputy Black subsequently pled guilty to vehicular homicide in the first degree, a felony under Georgia law. As a specific predicate offense to his conviction, Black admitted to committing the offense of reckless driving in that he "did drive a vehicle in reckless disregard for the safety of persons and property."

[2] The plaintiff has since voluntarily dismissed Douglas County Board of Commissioners as a defendant.

and Miller, in both their individual and official capacities.

The issue currently before the court is whether the district court erred in granting the defendants' motions for partial judgment on the pleadings. "We review *de novo* judgment on the pleadings. . . ." *Cunningham v. Dist. Attorney's Office*, 592 F.3d 1237, 1255 (11th Cir. 2010) (citing *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003)). "Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts." *Id.* (quoting *Andrx Pharms., Inc. v. Elan Corp.*, 421 F.3d 1227, 1232-33 (11th Cir. 2005)). "We accept all the facts in the complaint as true and view them in the light most favorable to the nonmoving party." *Id.* (citing *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001)).

The outcome of this case is controlled by *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996). In *Rooney*, a Florida deputy sheriff was speeding in his patrol vehicle when he collided with the plaintiffs' vehicle, injuring both the driver and the passenger. 101 F.3d 1378, 1379. Although the officer was on duty at the time of the crash, he was "neither engaged in a police pursuit nor responding to an emergency call, and he did not have his lights or sirens operating." *Id.* Affirming the district court's grant of summary judgment, the court in *Rooney* held that the officer's accident did not amount to a constitutional violation,

regardless of whether it amounted to negligence or even gross negligence. *Id.* at 1381. The court held:

> Under the reasoning of *Cannon* [*v. Taylor*, 782 F.2d 947 (11th Cir. 1986)], we do not believe that any alleged negligence on Deputy Watson's part amounts to a constitutional deprivation simply because he was speeding in the absence of an emergency response or police pursuit. Perhaps his driving at a high rate of speed in a non-emergency or non-pursuit situation reveals gross negligence rather than negligence, but it does not transform a state tort claim into a constitutional deprivation under the circumstances of this case.

Id.

As in *Rooney*, Deputy Black's conduct in this case, although likely tortious, does not rise to the level of a constitutional violation. Because we conclude that there was no constitutional violation, the municipality and the Sheriff are also entitled to judgment in their favor. *See Case v. Eslinger*, 555 F.3d 1317, 1328 (11th Cir. 2009) (concluding that Sheriff and municipality were entitled to summary judgment where the court found that there was no constitutional violation).

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 09-14574

District Court Docket No.
08-03877-CV-ODE-1

ROBERT BARNWELL,
As Surviving Spouse and
Personal Representative of
Tammy Barnwell, As Administrator
for the Estate of Tammy Barnwell,

Plaintiff-Appellant,

versus

DOUGLAS COUNTY,
DOUGLAS COUNTY BOARD
OF COMMISSIONERS,
SHERIFF PHIL MILLER,
Douglas County, in both his
official and individual capacity,
CHRISTOPHER BLACK,
in both his official and individual capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

(Filed Jul. 30, 2010)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: July 30, 2010
For the Court: John Ley, Clerk
By: Clark, Djuanna

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT BARNWELL, as surviving spouse and personal representative of Tammy Barnwell, and as Administrator for the Estate of Tammy Barnwell Plaintiff v. DOUGLAS COUNTY, PHIL MILLER, in his official and individual capacity, and CHRISTOPHER BLACK, in his official and individual capacity Defendants	CIVIL ACTION NO. 1:08-CV-3877-ODE

ORDER

(Filed Aug. 21, 2009)

Now before this Court is Defendants' Motion for Partial Judgment on the Pleadings [Doc. #14]. For the reasons stated below, this Court GRANTS Defendants' Motion for Partial Judgment on the Pleadings and DISMISSES Plaintiff's claims for relief under 42 U.S.C. § 1983 against Christopher Black, Sheriff Phil Miller, and Douglas County. This Court additionally declines to exercise supplemental jurisdiction over Plaintiff's remaining claims. *See* 28

U.S.C. § 1367(c)(3). Therefore, this Court REMANDS Plaintiff's action to the Superior Court of Douglas County.

I. Background

On the evening of November 14, 2007, on-duty Douglas County Deputy Sheriff Christopher Black ("Black") was driving a routine patrol in his county-owned law enforcement vehicle. Plaintiff Robert Barnwell ("Plaintiff") alleges that "Black has contended" that he received a dispatch call informing officers of a vehicle fleeing the scene of a suspected armed robbery several miles from Black's location [Doc. #8 at 5]. Plaintiff alleges that, without informing the dispatcher that he intended to respond to the call, and without activating his vehicle's emergency lights or siren, Black began driving his vehicle northbound on State Highway 5 toward the scene [Doc. #8 at 5-6]. In doing so, Black undisputedly exceeded the posted speed limit, at times driving in excess of 88 miles per hour. Plaintiff also alleges that Black's distance from the suspected armed robbery at the time he contends he received the dispatch call "makes it unlikely that he was actually responding to the dispatch" [Doc. #8 at 6].

At the same time, Tammy Barnwell ("Barnwell") was driving south on State Highway 5 [Doc. #8 at 7], When Black entered a curve in the highway, he lost control of his vehicle, crossing the center line of the two-lane roadway [Doc. #8 at 6-7]. Black's law

enforcement vehicle collided head-on with the oncoming vehicle driven by Barnwell, and she died shortly thereafter.

On November 24, 2008, Plaintiff, as Barnwell's surviving spouse and personal representative and the administrator of Barnwell's estate, filed suit in Douglas County Superior Court "seeking compensation in the form of monetary damages" [Doc. #1, Ex. A at 4]. Plaintiff named as defendants the Douglas County Board of Commissioners, Douglas County ("the County"), current Douglas County Sheriff Phil Miller ("Miller"), and Black (collectively, "the Defendants"), suing Miller and Black in both their individual and official capacities [Doc. #1, Ex. A at 3]. Plaintiff alleged that Black's "reckless or grossly negligent operation of his patrol vehicle was the proximate cause of [Barnwell's] injuries, causing extreme mental and physical pain and suffering leading up to her death" [Doc. #1, Ex. A at 9]. Plaintiff also asserted a claim against the County and Miller under 42 U.S.C. § 1983 for violating Barnwell's "constitutional rights to life, property, and travel without due process of law" [Doc. #1, Ex. A at 15].

On December 23, 2008, the Defendants timely removed the action, invoking this Court's original jurisdiction under 28 U.S.C. §§ 1331 and 1343 [Doc. #1]. On January 29, 2009, Plaintiff filed an Amended Complaint which added claims under 42 U.S.C. § 1983 against Black for allegedly "depriv[ing] [Barnwell] of her U.S. Constitutional rights to life, liberty, property, and travel, all without due process of law" [Doc. #8 at

14].[1] On February 17, 2009, the Defendants filed an Answer to the Amended Complaint and denied the majority of these allegations [Doc. #10].

On March 10, 2009, the Defendants filed the instant Motion for Partial Judgment on the Pleadings, arguing that Plaintiff's pleadings failed to state a claim under 42 U.S.C. § 1983 [Doc. #14 at 2]. Specifically, the Defendants argue that Black did not deprive Barnwell of any cognizable constitutional right, and therefore Section 1983 does not provide Plaintiff with any remedy against Black [Doc. #14 at 8]. In addition, the Defendants argue that, absent a constitutional violation by Black, Plaintiff may not bring Section 1983 claims against Black's alleged supervisors, Douglas County and Miller [Doc. #14 at 9]. Finally, the Defendants argue that Black and Miller, in their individual capacities, are entitled to qualified immunity from suit notwithstanding any of the defenses asserted under 42 U.S.C. § 1983 [Doc. #14 at 10].

In response, Plaintiff argues that Black, while acting under color of state law, deprived Barnwell of her constitutional rights to life, liberty, property, and travel without due process of law, thus rendering

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[1] On March 27, 2009, Plaintiff voluntarily dismissed all claims asserted in the Amended Complaint against the Douglas County Board of Commissioners, dismissed one of the state-law claims against Black, and dismissed a state-law *respondeat superior* claim against Miller in his individual capacity [Doc. #19 at 1-2].

Black liable to Plaintiff under 42 U.S.C. § 1983 [Doc. #18 at 9]. Plaintiff alleges that Black's actions displayed "recklessness" that rose to the level of "criminal homicide" which "shocks the conscience" [Doc. #18 at 9, 16]. Also, Plaintiff argues that Black's "egregious conduct" eliminates any qualified immunity to which he may otherwise be entitled [Doc. #18 at 16]. Finally, Plaintiff argues that the County and Miller displayed "deliberate indifference" to Douglas County officers' on-duty misconduct, rendering those defendants liable to Barnwell under 42 U.S.C. § 1983 whether or not Black individually violated Barnwell's constitutional rights [Doc. #18 at 20-24].

II. Standard of Review

"After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). In deciding a motion for judgment on the pleadings, this Court will "accept the facts in the complaint as true and . . . view them in the light most favorable to the nonmoving party." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998) (citing *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996)). As with a motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 561-62 (2007). "If upon reviewing the pleadings it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations,

the court should dismiss the complaint." *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002) (citing *White v. Lemacks,* 183 F.3d 1253, 1255 (11th Cir. 1999)).

III. Discussion

A. Plaintiff's Section 1983 Claim Against Black

42 U.S.C. § 1983 imposes liability on anyone who, under color of state law, deprives any person "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege and establish "(1) that the defendant deprived [him] of a right secured under the United States Constitution or federal law and (2) that such deprivation occurred under color of state law." *Arrington v. Cobb County,* 139 F.3d 865, 872 (11th Cir. 1998).

Section 1983 provides federal statutory redress for those whose rights under the Due Process Clause of the Fourteenth Amendment, among other constitutional rights, are violated by state actors. *See generally County of Sacramento v. Lewis,* 523 U.S. 833 (1998) (Section 1983 suit against county, sheriff's department, and sheriff's deputy for depriving decedent of right to life without due process of law). In addition to procedural fairness, the "substantive component" of the Due Process Clause bars "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams,* 474 U.S. 327, 331 (1986).

Executive officials acting under color of state law violate the "substantive component" of the Due Process Clause only when their abuse of power "shocks the conscience." *Lewis,* 523 U.S. at 846. This standard ensures that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Id.* at 848. To that end, the Supreme Court has concluded that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process," and thus can never "shock[ ] the conscience." *Id.* at 849. In contrast, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.*

When executive officials' acts stemming from "'recklessness or "gross negligence"'" shock the conscience "is a matter for closer calls." *Id.* (quoting *Daniels,* 474 U.S. at 334 n.3). To make these "closer calls," the Supreme Court has emphasized the crucial role played by the factual context in which the executive official acted. *Id.* at 851. When "unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates" the Due Process Clause. *Id.* at 853. Thus, when police officers engage in high-speed automobile chases "with no *intent* to harm suspects physically or to worsen their legal plight," no liability under the

Fourteenth Amendment, remediable under Section 1983, arises. *Id.* at 854 (emphasis added).

Plaintiff does not allege that a high-speed chase situation like the one faced by the Court in *Lewis* occurred here. Thus, Plaintiff need not allege that Barnwell was killed while Black intended to harm a fleeing suspect physically or worsen that suspect's "legal plight." *Id.* Instead, Plaintiff may survive a motion for judgment on the pleadings by alleging "culpability falling within the middle range" of recklessness and backing those allegations with sufficient factual support. *Id.* at 849.

Plaintiff's pleadings do not allege sufficient factual allegations that, even if accepted as true by this Court, would support a claim of recklessness by Black and thus support a claim that Black violated Barnwell's constitutional rights. Nowhere in the Amended Complaint does Plaintiff affirmatively allege that Black received no dispatch call about a suspected armed robbery or that he sped along State Highway 5 without any legitimate law enforcement justification. Instead, Plaintiff speculatively alleges that it is "unlikely that [Black] was actually responding to the dispatch" based on the distance of the suspected armed robbery from Black's location at the time [Doc. #8 at 6]. However, even if this Court were not only to accept as true that it was "unlikely" that Black *was* responding to the dispatch, but also that there was no dispatch call that evening, Plaintiff has still failed to allege facts sufficient to state a claim for relief under 42 U.S.C. § 1983.

Two cases inform this conclusion. In *Cannon v. Taylor,* a police officer struck the plaintiff's vehicle, killing the plaintiff, while "responding to a disturbance call at a local pool hall." 782 F.2d 947, 948 (11th Cir. 1986). The officer was driving at least sixteen miles per hour over the posted speed limit at the time of the collision and had not activated his emergency lights or siren. *Id.* Concluding that the officer had acted either negligently or, at most, grossly negligently, the court held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Id.* at 950.

In *Cannon,* the officer was undisputedly responding to a "disturbance call" presumably relayed to him by a police dispatcher. Plaintiff alleges that it was "unlikely" that Black was responding to a dispatch call at the time of the incident given his distance from the scene of the suspected crime [Doc. #8 at 6]. However, even accepting that it was not only "unlikely," but also factually untrue, that Black was responding to a dispatch call when he collided with Barnwell's vehicle, Plaintiff has not pled sufficient facts to state a claim for relief against Black under 42 U.S.C. § 1983.

In *Rooney v. Watson,* a Florida deputy sheriff was speeding in his patrol vehicle when he collided with plaintiffs' vehicle, injuring both the driver and the passenger. 101 F.3d 1378, 1379 (11th Cir. 1996). At

the time, the deputy sheriff was "neither engaged in a police pursuit nor responding to an emergency call, and he did not have his lights or siren operating." *Id.* There, the plaintiffs attempted to distinguish their case from *Cannon* by alleging that the deputy sheriff was not responding to a dispatch call or any other emergency situation when the incident occurred. *Id.* The court nonetheless dismissed their Section 1983 claims, extending the reasoning in *Cannon* to the new facts presented. *See id.* at 1381 ("Although Watson was not responding to an emergency call, we believe, *Cannon*'s holding dictates the result we reach."). The court surmised that "[p]erhaps [Watson's] driving at a high rate of speed in a non-emergency or non-pursuit situation reveals gross negligence rather than negligence, but it does not transform a state tort claim into a constitutional deprivation under the circumstances of this case." *Id.*

The facts asserted in Plaintiff's pleadings, even if accepted as true, thus do not establish that Black was reckless in colliding with Barnwell's vehicle. Had Black received a dispatch call to which he was responding, this case would fall squarely within the holding of *Cannon,* and Plaintiff clearly would have no Section 1983 claim against Black for his actions performed in response to the dispatch call. However, even accepting that it was "unlikely," or even completely untrue, that Black was responding to a dispatch call or other emergency situation, the Eleventh Circuit in *Rooney* roundly rejected the contention that an on-duty police officer's speeding, when that

conduct causes another's injury, "amounts to a constitutional deprivation." *Id.* Whether Black was responding to a dispatch call or not, no facts alleged in Plaintiff's Amended Complaint indicate that Black's on-duty actions violated Barnwell's constitutional rights. Therefore, Plaintiff has not pled facts that, even if taken as true, show that Black deprived Barnwell of any constitutional rights, and therefore Plaintiff has not stated a claim for relief against Black under 42 U.S.C. § 1983.

B. Plaintiff's Remaining Section 1983 Claims

When a plaintiff establishes liability against a government official under 42 U.S.C. § 1983, derivative liability may also extend to "municipalities and other local government units" directly responsible for "action pursuant to official municipal policy of some nature [that] caused a constitutional tort." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 691 (1978). Plaintiff has thus asserted claims under Section 1983 against the County and Miller in his official capacity "for Black's reckless actions, which were caused by the County and the Sheriff's recklessness and deliberate indifference" [Doc. #8 at 14].

In view of this Court's disposition of Plaintiff's Section 1983 claim against Black in Part III.A of this Order, Plaintiff has not pled facts sufficient to state a claim for relief against the County and Miller under Section 1983. Neither *Monell* nor "any other of [the Supreme Court's] cases authorizes the award of

damages against a municipal corporation based on the actions of one of its officers when in fact . . . the officer inflicted no constitutional harm." *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). *See also Case v. Eslinger,* 555 F.3d 1317, 1328 (11th Cir. 2009) ("[T]he district court concluded that, absent a violation of Case's constitutional rights by Officer Davis, both Sheriff Eslinger and the City, as Davis's principals, are entitled to summary judgment. We agree with the district court."); *Rooney,* 101 F.3d at 1381 ("Since we have determined that Deputy Watson's conduct did not cause the Rooneys to suffer a constitutional deprivation, we need not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training.").[2] Therefore, given this

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[2] This Court declines Plaintiff's invitation to "reject *Rooney* as inconsistent conflicting precedent and adopt the analysis in *Cannon* and [*Fagan v. City of Vineland,* 22 F.3d 1283 (3d Cir. 1994)]" [Doc. #18 at 23]. The Eleventh Circuit in *Cannon* considered the municipal entity's liability on the merits even after absolving the individual government officer of any Section 1983 liability. *Cannon,* 782 F.2d at 950-51. Plaintiff argues that this analysis conflicts with the court's summary dismissal of the *Rooney* plaintiffs' Section 1983 claims against the municipal entity after the officer in that case was absolved of Section 1983 liability.

Viewed through the lens of *Heller,* though, the two analyses are entirely consistent. The *Cannon* court's analysis predated the decision in *Heller* by two months and therefore proceeded without the benefit of the Supreme Court's clarification of *Monell* derivative liability that *Heller* provided. The Eleventh Circuit has since applied the *Heller* standard. *See Rooney,* 101 F.3d at 1381. Rather than follow conflicting, non-binding precedent like *Fagan,* this Court will simply apply the *Heller*

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Court's disposition of Plaintiff's Section 1983 claim against Black, Plaintiff can prove no set of facts consistent with the allegations in the Amended Complaint that would establish derivative Section 1983 liability against either the County or Miller.

In addition to Plaintiff's allegations for derivative Section 1983 liability against the County and Miller, Plaintiff also alleges that the County and Miller are directly liable under Section 1983 based on their "decision to be deliberately indifferent to known and obvious deficiencies in training, supervision, and discipline needs" [Doc. #8 at 15]. According to Plaintiff, this decision "was conduct that shocks the conscience and that, in and of itself, constitutes misconduct that proximately caused [Barnwell's] violent death, depriving her of her constitutional rights to life, liberty, property, and travel, all without due process of law" [Doc. #8 at 15].

Again, given this Court's disposition of Plaintiff's Section 1983 claim against Black, Plaintiff has not pled sufficient facts to state a claim for relief against the County or Miller for direct violations of Section 1983. A municipality can be held liable, under Section 1983, for its "failure to train employees." *City of Canton v. Harris,* 489 U.S. 378, 388 (1989). However, *Harris* requires "a direct causal link between a municipal policy or custom and [an] alleged

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standard faithfully, as the Eleventh Circuit has done for over a decade.

constitutional deprivation." *Id.* at 385 (emphasis added). As Plaintiff has not pled sufficient facts to indicate that any failure to train on the part of the County or Miller had a direct causal link to any deprivation of *constitutional* rights, Plaintiff has not stated any claim against the County or Miller for direct violations of Section 1983.

C. Qualified Immunity

Notwithstanding Plaintiff's failure to allege sufficient facts that, if true, state a claim under Section 1983 against Black and Miller, this Court concludes that Defendants Black and Miller, in their individual capacities, possess qualified immunity against Plaintiff's Section 1983 claims against them.

Qualified immunity from Section 1983 actions protects government defendants sued in their individual capacities if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The immunity exists "to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit 'all but the plainly incompetent or one who is knowingly violating the federal law.'" *Lee v. Ferraro,* 284 F.3d 1188, 1194 (11th Cir. 2002) (citing *Willingham v. Loughnan*, 261 F.3d 1178, 1187 (11th Cir. 2001)).

Even if Plaintiff could prove a constitutional violation by Black, Miller, or both, such that either or

both would be liable to Plaintiff under 42 U.S.C. § 1983, this Court concludes that neither Black nor Miller would have "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818. In the Eleventh Circuit, "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose."[3] *Jenkins v. Talladega City Bd.*

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[3] Plaintiff argues a different standard: that a right may be "clearly established" by "(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Lewis v. City of West Palm Beach,* 2009 WL 606546 at *3 (11th Cir. 2009). Plaintiff then argues that footnote 13 in *County of Sacramento v. Lewis* provides the requisite case law to clearly establish a deprivation of constitutional rights when a police officer "intentionally misuses his vehicle in a non-emergency context" and that, even without supporting case law, Black's conduct was "so egregious" as to eliminate qualified immunity [Doc. #18 at 16-18].

Even accepting Plaintiff's alternative standard regarding "clearly established" rights, this Court believes that *Rooney* provides "indistinguishable facts" to the instant action, rather than a case where speeding police officers in an unmarked car tailgated and chased a plaintiff's car for over twenty miles. *See Lewis,* 523 U.S. at 854 n.13 (citing *Checki v. Webb,* 785 F.2d 534 (5th Cir. 1986)). The situation presented by *Checki* differs dramatically from this situation (and from *Rooney*) and could not have given Black "fair and clear warning" that his conduct might be unconstitutional. *Hope v. Pelzer,* 536 U.S. 730, 746 (2002).

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of Educ., 115 F.3d 821, 827 n.4 (11th Cir. 1997). No such "clearly established law" existed in this case to give either Black or Miller fair notice that any behavior on their part would violate Barnwell's constitutional rights.

In fact, the law that existed at the time of Black's actions indicated the opposite. At the time, multiple decisions of the Eleventh Circuit Court of Appeals indicated that on-duty police officers' speeding would not rise to the level of a constitutional deprivation of another's rights, whether or not that officer was responding to an emergency situation or dispatch call. *Rooney*, 101 F.3d 1378; *Cannon*, 782 F.2d 947. Plaintiff has not cited this Court to any relevant Supreme Court, Eleventh Circuit, or Georgia Supreme Court authority suggesting otherwise. For these reasons, the Court concludes that, even if Black or Miller violated the Constitution, they are entitled to qualified immunity from Section 1983 liability in their individual capacities, as no "clearly established

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Plaintiff acknowledges that the "'conduct so egregious' exception [is] often applied in excessive force cases" [Doc. #18 at 18]. In fact, Plaintiff does not cite this Court to any cases applying this "exception" that do *not* involve allegations of excessive force used by law enforcement. *See Priester v. City of Rivera Beach*, 208 F.3d 919 (11th Cir. 2000) (involving excessive force of police dog on man arrested for stealing minimal amount of golf shop merchandise). As this case does not present an excessive force question, and Plaintiff states no reason why the "'conduct so egregious' exception" from excessive force cases should apply here, this Court declines to apply that basis for recognizing a "clearly established" federal right.

law" indicated the unconstitutional nature of their behavior when they chose to act.

IV. Conclusion

Considering only the parties' pleadings, accepting the facts alleged in Plaintiff's Amended Complaint as true, and viewing those facts in the light most favorable to Plaintiff, this Court concludes that Plaintiff would not be entitled to relief under any provable set of facts consistent with the allegations. Therefore, this Court GRANTS Defendants' Motion for Partial Judgment on the Pleadings [Doc. #14]. This Court DISMISSES Plaintiff's federal statutory claims against Defendants. Plaintiff has stipulated that, aside from the federal statutory claims, the only remaining claims are "state law negligence claims" against the County and Miller, in his official capacity [Doc. #19 at 2]. This Court declines to exercise supplemental jurisdiction over these remaining claims. *See* 28 U.S.C. § 1367(c) (3). Therefore, this Court REMANDS Plaintiff's action to the Superior Court of Douglas County.

SO ORDERED, this 21 day of August, 2009.

/s/ Orinda Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT BARNWELL, as surviving spouse and personal representative of Tammy Barnwell, and ROBERT B BARNWELL, as Administrator for the Estate of Tammy Barnwell,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 1:08-CV-3877
DOUGLAS COUNTY, DOUGLAS COUNTY BOARD OF COMMISSIONERS, DOUGLAS COUNTY SHERIFF PHIL MILLER, in both his official and individual capacity, and CHRISTOPHER BLACK, in both his official and individual capacity,	)	JURY TRIAL DEMANDED
Defendants.	)	

AMENDED COMPLAINT

COMES NOW, ROBERT BARNWELL, as the surviving spouse and personal representative of Tammy Barnwell, and ROBERT BARNWELL, as the Administrator of the Estate of Tammy Barnwell and files this Amended Complaint against Defendants DOUGLAS COUNTY, DOUGLAS COUNTY BOARD

OF COMMISSIONERS, Douglas County SHERIFF PHIL MILLER, both in his official and individual capacity, and former Douglas County Sheriff's Deputy CHRISTOPHER BLACK, both in his official and individual capacity. This Amended Complaint strikes Count Three of the original complaint, replacing it with the Count Three that appears in this complaint. This Amended Complaint is based on the following allegations:

INTRODUCTION

1.

This is a civil action seeking compensation in the form of monetary damages from the Defendants for wrongfully causing the tragic, premature, and violent death of Tammy Barnwell. Both Tammy Barnwell's surviving spouse, Robert Barnwell, and her Estate are entitled to separate recoveries from the Defendants based on the fact that they caused her wrongful death and caused her extreme pain and suffering in the last moments of her life when, on November 14, 2007, while she was driving home from work southbound on Georgia Highway 5, Douglas County Deputy Sheriff Christopher Black lost control of his speeding patrol car and collided head-on with her 2003 Honda Accord. Ms. Barnwell, after suffering great terror, pain and suffering, died from blunt force trauma to her chest, sustained as a direct and proximate cause of Black's reckless or grossly negligent conduct. Douglas County and Sheriff Miller are

jointly and severally liable for Ms. Barnwell's injuries, due to their deliberate indifference to the well-known and obvious need to improve driving training and supervision among Sheriff Department employees due to numerous prior incidents of reckless and negligent driving.

PARTIES AND VENUE

2.

Robert Barnwell ["Barnwell"] is the surviving spouse of Tammy Barnwell ["Tammy"], and the duly appointed Administrator of the Estate of Tammy Barnwell ["the Estate"] [collectively, "Plaintiffs"]. As the surviving spouse, Barnwell is statutorily entitled to recover for the wrongful death of Tammy, as a result of the Defendants' wrongful conduct, an amount that fairly compensates him for the full value of Tammy's life.

3.

The Estate is legally authorized to pursue the cause of action for Tammy's severe mental and physical pain and suffering preceding her violent death, all proximately caused by the Defendants' conduct.

4.

Defendant Douglas County Board of Commissioners is the governing authority of Defendant Douglas County [collectively referred to as "the

County"], a body corporate with the power to sue and be sued. The County is subject to the jurisdiction of this court. The summons and complaint may be served personally upon the Chairman of the Board of Commissioners, Tom Worthan, at the office of the Board of Commissioners, 8700 Hospital Drive, Third Floor, Douglas County Courthouse, Douglasville, Georgia 30134.

5.

Douglas County Sheriff Phil Miller ["the Sheriff"] is subject to the jurisdiction of this court and may be personally served with process at his office at the Douglas County Sheriff's Department, 6840 West Church St., Douglasville, Georgia 30134.

6.

Former Douglas County Deputy Sheriff Christopher Black ["Black"] is subject to the jurisdiction of this court and may be personally served with process at his home, 27 Green Elm Way, Carrollton, Georgia 30116.

7.

Douglas County is where the injury occurred making venue proper in said County.

FACTS

8.

On November 14, 2007, shortly before 8:00 p.m., Black was driving his assigned County-owned police cruiser equipped with lights and siren, on routine patrol in the southern end of the County.

9.

Upon information and belief, Black has contended that he heard a dispatch call alerting units to a vehicle being driven by a subject fleeing the scene of an armed robbery at Arbor Place Mall. However, the alert identified the vehicle's location as well over ten (10) miles north of Black's location. Therefore, the alert was one to which Black should not have immediately responded since other units were in close proximity.

10.

Contrary to proper training, Black did not radio his alleged plans to respond to the call to dispatch or to his shift supervisor.

11.

A call confirming response is required by the Douglas County Sheriff's Office's Standard Operating Procedures Manual ["SOP"], but County personnel are not adequately trained to follow said SOP.

12.

The distance between Black's location and the robbery location makes it unlikely that he was actually responding to the dispatch.

13.

Black drove north on State Highway 5 in the dark at high rates of speed that sometimes exceeded 88 miles per hour. Contrary to SOP, he did not activate his siren or his emergency lights to warn motorists of an oncoming emergency vehicle traveling at speeds that greatly exceeded the speed limit and were patently unsafe for the conditions and the road being traveled.

14.

When Black entered the turn on Highway 5, approximately half a mile north of Cantrell Road, he was traveling at a speed far in excess of the speed limit. His speed was not safe for the conditions that then existed on the roadway which included darkness and a sharp turn.

15.

Black operated his patrol vehicle in a manner that exhibited recklessness or gross negligence in regard for the safety of others. Black lost complete control of his patrol vehicle as he entered the turn, causing his vehicle to travel across the center line of

the two-lane roadway and to collide into oncoming traffic.

16.

Tammy was driving at the speed limit and was already close to her home. She was traveling southbound on Highway 5, driving in a prudent manner, and obeying all rules of the road. She was wearing her seatbelt.

17.

Black's reckless or grossly negligent operation of his patrol vehicle caused him to lose control while attempting to brake. The patrol car then slammed into the front of Tammy's Honda Accord at a speed in excess of 38 miles per hour at impact.

18.

Black was reckless or grossly negligent in the operation of his patrol vehicle in the following particulars:

a. in failing to have immediate and proper control over said vehicle;

b. in driving with a reckless or grossly negligent disregard for the safety of persons on the roadway by traveling at an excessive speed without emergency lights or sirens;

c. in driving at a speed greater than was reasonable and prudent under the conditions and disregarding the actual and potential hazards then existing on the roadway; and

d. in failing to drive on the right side of the divided roadway.

19.

Black's reckless or grossly negligent operation of his patrol vehicle was the proximate cause of Tammy's injuries, causing extreme mental and physical pain and suffering leading up to her death.

20.

As a direct and proximate result of Black's reckless or grossly negligent operation of his patrol vehicle, Tammy endured extreme pain and suffering in the moments immediately preceding and following the collision.

21.

Black directly and proximately caused Tammy's pain, suffering and death by using excessive, unnecessary and unjustified deadly force.

22.

Upon information and belief, during the time surrounding Black's collision with Tammy, the County

and the Sheriff were well-aware of a pattern of reckless driving among the officers under their stead, yet demonstrated a deliberate indifference to that pattern in their decision not to require additional supervision or training to improve officers' driving safety. The risk was obvious that such reckless driving would result in an officer striking and killing another motorist. This deliberate indifference deprived Tammy of her right to life without due process of law.

23.

Specifically, during the years 2005-2007, the County and the Sheriff were aware of at least 151 driving accidents involving officers in the Sheriff's Department. In at least 58 of those accidents, the Sheriff's Department's accident review board found the officer involved to be "at fault," meaning that the officer "did not exercise caution at the time of the accident."

24.

Despite knowledge of these accidents, the Sheriff's Department did not schedule any training in driving skills or safety from April 2005 to July 2008.

25.

Prior to July 2008, the last documented driving training was scheduled for April 2005, when a class

called "Defensive Driving" was offered. In July 2008, a class called "PIT Driving – Assigned Only" was offered.

26.

Upon information and belief, despite their knowledge of a pattern of unsafe driving among officers of the Sheriff's Department, the County and the Sheriff took no substantial action to increase supervision, train, or discipline officers related to their poor driving skills.

27.

The deliberate indifference to the known need to increase training and supervision of officers in safe driving practices constituted a deprivation of Ms. Barnwell's constitutional rights to life, property, and travel without due process of law.

28.

This deliberate indifference to the additional training and supervision necessary to prevent officers from colliding with other motorists was the proximate cause of Black's collision with Tammy.

29.

Prior to her death, Tammy held the position of Store Manager at the Wal-Mart located in Douglasville,

Georgia. Tammy was highly compensated in that position earning well over $100,000.00 per annum, and she planned to work and continue to advance within Wal-Mart for the remaining twenty (20) years of her career. The economic loss component of Tammy Barnwell's life, standing alone, exceeds Two Million ($2,000,000.00) Dollars.

30.

Barnwell, as Tammy's surviving spouse, is entitled to recover the full value of Tammy's life based upon the Defendants' conduct which proximately caused her premature and violent death. The full value of life is to be determined by the enlightened conscience of the jury.

31.

The Estate is entitled to recover an amount sufficient to compensate Tammy for her extreme pain and suffering in the moments preceding her death, in an amount to be determined by the enlightened conscience of the jury.

SUBSTANTIVE ALLEGATIONS

COUNT ONE
VIOLATION OF MINISTERIAL DUTIES BY DEFENDANT CHRISTOPHER BLACK

32.

Paragraphs one (1) through thirty-one (31) of this Complaint are incorporated herein by this reference.

33.

Former Deputy Black, in operating his vehicle at a high rate of speed without warning lights or sirens, and without responding to dispatch his intent to respond to the robbery at Arbor Place mall, violated his ministerial duties, as established by the Department's SOP.

34.

Black's violation of his ministerial duties proximately caused Tammy's pain and suffering in the moments preceding her death.

35.

Black's violation of his ministerial duties proximately caused Tammy's wrongful death.

36.

Black is therefore liable to the Estate for Tammy's pain and suffering, and to Barnwell for Tammy's wrongful death, in an amount to be determined by the enlightened conscience of the jury.

COUNT TWO
LIABILITY OF THE COUNTY AND THE SHERIFF FOR THE NEGLIGENT DRIVING OF THEIR EMPLOYEE BLACK

37.

Paragraphs one (1) through thirty-six (36) of this Complaint are incorporated herein by this reference.

38.

The County and the Sheriff are liable for the reckless or grossly negligent driving of their employee Black, carried out in furtherance of his employment.

39.

The County and the Sheriff, to the extent that they have purchased insurance covering injuries arising from the operation of motor vehicles by their employees, have waived any claims of immunity with regard to such operation.

40.

The County and the Sheriff are liable to the Estate for Tammy's pain and suffering, and to Barnwell for Tammy's wrongful death, in an amount to be determined by the enlightened conscience of the jury.

COUNT THREE
CONSTITUTIONAL CLAIM
AGAINST CHRISTOPHER BLACK,
THE COUNTY AND THE SHERIFF

41.

Paragraphs one (1) through forty (40) of this Complaint are incorporated herein by this reference.

42.

Pursuant to 42 U.S.C. § 1983, the Estate is entitled to recover compensatory and punitive damages from Deputy Black for his reckless driving, carried out in a non-emergency situation and with a deliberate indifference to human life, and which constituted an intentional misuse of his patrol vehicle in a manner that shocks the conscience. His conduct deprived Tammy of her U.S. Constitutional rights to life, liberty, property, and travel, all without due process of law.

43.

The Estate is entitled to recover compensatory damages from the County and the Sheriff in his official capacity, as well as punitive damages from the Sheriff in his individual capacity, for Black's reckless actions, which were caused by the County and the Sheriff's recklessness and deliberate indifference. The County and the Sheriff decided not to act in spite of the known and obvious needs to train, supervise, and discipline officers who lacked the skills, knowledge, and character to operate emergency vehicles in a safe manner. This misconduct proximately caused Tammy's violent death.

44.

Apart from the actual collision that resulted from the County and the Sheriff's misconduct, the County and the Sheriff's decision to be deliberately indifferent to known and obvious deficiencies in training, supervision, and discipline needs was conduct that shocks the conscience and that, in and of itself, constitutes misconduct that proximately caused Tammy's violent death, depriving her of her constitutional rights to life, liberty, property, and travel, all without due process of law. For these acts, the Estate is entitled to recover compensatory damages from the County and the Sheriff in his official capacity, and punitive damages from the Sheriff in his individual capacity.

Wherefore, Plaintiffs pray for:

a. a trial by jury;

b. recovery of Judgement by the Estate against the Defendants for the injuries, including pain and suffering and unconstitutional deprivations of the right to life, property, and travel, experienced by Tammy Barnwell, in an amount to be determined by the enlightened conscience of the jury;

c. recovery of a monetary Judgment by Robert Barnwell in an amount that will fully compensate him for the full value of Tammy Barnwell's life;

d. an award of reasonable attorneys' fees;

e. all costs of this action; and,

f. such other and further relief as this court may deem just and proper.

Respectfully submitted, this 27 day of January, 2009.

/s/ A. Lee Parks
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